SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1967

No. 422

PATRICK D. GOLDSMITH, by EDWARD S. BLACKSTONE, his Guardian *ad Litem*,

Petitioner,

against

STUART M. GOLDSMITH,

Respondent.

REPLY BRIEF OF PETITIONER FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Respondent has misread the opinion of the Supreme Court of Georgia in *Cole* v. *Cole*, 221 Ga. 171, 143 S. E. 2nd 667, decided on July 12, 1965. The court plainly held that a divorce decree, obtained in Alabama by the parties' false representations of their residence in the sister state, is a nullity and may be collaterally attacked in any court of Georgia by a non-party to the purported decree who is materially and adversely affected by such decree.

Respondent incorrectly states at pages 37-38 of his brief that the Georgia Superior and Supreme Courts "applied the law of the rendering state, finding that since Alabama would permit such a collateral attack", the courts of Georgia permitted attack. On the contrary the *Cole* case contains no finding that collateral attack would be allowed in Alabama. The evidence of Mrs. Cole conclusively showed

in her Georgia divorce action that "a fraud was practiced by her and her former husband on the Alabama court which purportedly divorced them." Such decree, being a nullity, was subject under Georgia law to collateral attack by one not a party to such foreign divorce.

Divorce applicants must plead and prove *bona fide* residence in Georgia for the prescribed period, now six months.

> *Dicks* v. *Dicks,* 177 Ga. 379 (1933);
> *Bellamy* v. *Bellamy,* 187 Ga. 56, 58 (1938);
> *Owens* v. *Owens,* 189 Ga. 338 (1939).

In *Bellamy* the Supreme Court of Georgia held that parties to a divorce suit, in which defendant was a non-resident, could not waive jurisdiction by plea or otherwise

> "So as to dispense with proof in the court"

of plaintiff's *bona fide* residence.

While respondent makes no claim of any offer of proof of Mrs. Goldsmith's "residence" in Augusta, he has the temerity to assert that her petition for divorce falsely *alleges* six months residence in Georgia.

The divorce petitioner verified only the *numbered* paragraphs of her petition. No such paragraph referred to her residence anywhere. Addressed to the Superior Court of Richmond County, the divorce petition contains no caption or title. Preceding the body of the petition containing five *numbered* and sworn allegations is the following unsworn and untrue preamble:

> "This petition of Florence A. Goldsmith * * * as resident of Richmond County, Georgia, for more than six months prior to the filing of this petition against Stuart M. Goldsmith, as Defendant, respectfully shows:"

Mr. Jackson Cook, an attorney in active practice in Atlanta, Georgia, gave the following opinion as to the lack of evidence or proof of the essential jurisdictional fact of residence in the Georgia divorce court record:

> "My opinion has been requested as to whether a decree of divorce granted by a Georgia court may be collaterally attacked in Georgia under the following state of facts:
>
> On April 24, 1952, Mrs. Florence D. Goldsmith journeyed to Georgia for the purpose of conferring with her attorney in regard to obtaining a total divorce from her husband, Stuart M. Goldsmith. Mrs. Goldsmith was at the time a resident of New York, New York, and had not previously nor has she ever been a resident of Georgia. Mrs. Goldsmith remained in Georgia part of one day and thereafter returned to New York. A petition seeking a decree of total divorce was filed with the Superior Court of Richmond County, Georgia, wherein Mrs. Goldsmith alleged in the preamble to said petition that she had been a resident of Richmond County, Georgia, for 'more than six months prior to the filing' of said petition. In addition to the preamble which recited the allegation of residence, there were five consecutively numbered paragraphs. Only the consecutively numbered paragraphs were sworn to by the plaintiff, Mrs. Goldsmith. At no point in the petition did Mrs. Goldsmith swear to the fact of residence nor does the record of proceedings disclose any evidence as to her residence. A decree of total divorce was granted to Mrs. Goldsmith on May 27th, 1952, with the only evidence being Mrs. Goldsmith's deposition in which her residence was not mentioned.
>
> I have researched the law of Georgia as it relates to collateral attack upon a decree of divorce under the foregoing state of facts, and it is my opinion that a decree wherein the record discloses no proof of an essential jurisdictional fact is void on its face and thus is subject to attack 'in any court. . . . by any person' whose rights are affected

under the provisions of Ga. Code Section 110-701 (1933)."

Phillips v. *Phillips*, 211 Ga. 305, 85 S. E. 2d 427 (1955),

cited by respondent in his brief (p. 20), is not in point. There the infant plaintiff, a third party to the divorce decree, was not allowed to attack the decree directly under Georgia Code section 37-813. That section provides that equity will grant relief as between the original parties or their privies in estate. In that case plaintiff's father was deceased. The case has no bearing upon the Georgia law of collateral attack.

Thomas v. *Lambert*, 187 Ga. 616, 1 S. E. 2nd 443,

is equally beside the mark. In a headnote opinion the court said:

> "A domestic judgment cannot be attacked as void, unless its invalidity appears on the face of the record. * * *
>
> The decree in the previous divorce suit is not void on the face of the record, since the petition in that case contained the positive averment of the residence of the defendant in the county where the divorce suit was filed. . . ."

On the other hand in the case at bar, there is not only no "positive averment" of the divorce petitioner's residence, but the entire record of the divorce reveals, as to the essential jurisdictional residence in Georgia, no pleading, admission, evidence or finding thereof.

Respectfully submitted,

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